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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 10, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATES OF LOUISIANA, TEXAS, MISSISSIPPI, ALABAMA AND FLORIDA

ON MOTION FOR JUDGMENT ON AMENDED COMPLAINT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM

The United States of America asks leave of the Court to file its supplemental memorandum, submitted herewith. This supplemental memorandum is limited to (1) certain historical materials we have discovered since the filing of our Reply Brief, and (2) short comments on three matters raised by Louisiana's Reply Brief and Texas' Memorandum of Additional Research.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1959.

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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I

ADDITIONAL EXAMPLES OF AMERICAN ADHERENCE TO THE THREE-MILE RULE BETWEEN 1818 AND 1848

A. *Negotiations with Russia, 1823–1824, compelling Russia to give up its claim to exclude foreign navigation within 100 miles of the coasts of Alaska and Siberia.*

By ukase of September 4/16, 1821, Alexander II claimed for Russia all the coasts and islands extending from Bering Strait southward to 45° 50′ north latitude along the coast of Siberia and the Kurile Islands and to 51° north latitude on the western coast of North America (about the northern end of Vancouver

Island), and forbade foreign vessels to approach within 100 Italian miles of these coasts. 4 *Fur Seal Arbitration* 370–376. Both the United States and Great Britain protested strongly that this violated the right of free navigation allowed by international law, and both succeeded in securing treaties by which Russia renounced its pretensions. Treaty between the United States and Russia, April 5/17, 1824, 8 Stat. 302; Treaty between Great Britain and Russia, February 25, 1825, 4 *Fur Seal Arbitration* 42.

The defendants contend that in those negotiations the United States remained silent as to the permissible width of territorial waters (Joint Brief, 218); but we submit that the United States in fact indicated its adherence to the "cannon shot" rule. Cannon shot was then considered the equivalent of three miles (see U.S. Brief, 63), the distance for which the British were then contending, and they seem to have considered their position to be the same as ours. The treaties with Russia guaranteed free navigation in the Pacific Ocean without defining any marginal belt; but it was held in the Fur Seal Arbitration of 1893 between the United States and Great Britain that the marginal belt retained by Russia under those treaties and subsequently transferred to the United States by the Alaskan cession was limited to "the reach of cannon shot from the shore," "the ordinary limit of territorial waters," and "the ordinary three-mile limit." The award of the arbitrators, using those terms interchangeably, is significant both as an interpretation of the intention of the parties to the treaties and as a declaration of the international law at that time. We

quote below passages of various documents which we believe support our view of this episode:

Negotiations between the United States and Russia over Russia's claim to exclude foreign ships from waters within 100 miles of the Alaskan and Siberian coasts appear in *American State Papers,* 5 Foreign Relations 434–471. On December 17, 1823, Mr. Middleton, the American Ambassador, handed to Count Nesselrode, Russian Foreign Secretary, a memorandum on the subject which said in part (*ibid.,* 449 at 452; see 457):

> Universal usage, which has obtained the force of law, has established for all the coasts an accessory limit of a moderate distance, which is sufficient for the security of the country and for the convenience of its inhabitants, but which lays no restraint upon the universal rights of nations, nor upon the freedom of commerce and of navigation.—(See Vattel, B. I, chap. 23, sec. 289.)

The passage from Vattel, *Law of Nations,* there referred to (printed in U.S. Brief, 192–193) includes the statement:

> To-day the area of marginal seas which is within the reach of a cannon shot from the coast is regarded as part of the national territory * * *.

The treaty of April 5/17, 1824, 8 Stat. 302, by which Russia yielded to the American protest, provided in its first article:

> It is agreed, that, in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects

> of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives * * *.

On December 8, 1824, George Canning, British Foreign Secretary, wrote to Stratford Canning, British Minister to Russia, regarding concurrent Anglo-Russian negotiations on the same subject (4 *Fur Seal Arbitration* 37, 38):

> The law of nations assigns the exclusive sovereignty of 1 league to each Power on its own coasts, without any specific stipulation, and though Sir Charles Bagot was authorized to sign the Convention with the specific stipulation of 2 leagues, in ignorance of what had been decided in the American Convention at the time, yet, after that Convention has been some months before the world, and after the opportunity of consideration has been forced upon us by the act of Russia herself, we cannot now consent, in negotiating *de novo,* to a stipulation which, while it is absolutely unimportant to any practical good, would appear to establish a contrast between the United States and us to our disadvantage.

The resulting Treaty of February 25, 1825, between Great Britain and Russia provided, in its first article (4 *Fur Seal Arbitration* 42):

> It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in

> landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives * * *.

Regarding that provision, Stratford Canning, British Minister to Russia, wrote to George Canning, British Foreign Secretary, April 3/15, 1825 (4 *Fur Seal Arbitration* 454, 455):

> With respect to the right of fishing, no explanation whatever took place between the Plenipotentiaries and myself in the course of our negotiations. As no objection was started by them to the Article which I offered in obedience to your instructions, I thought it unadvisable to raise a discussion on the question; and the distance from the coast at which the right of fishing is to be exercised in common passed without specification, and consequently rests on the law of nations as generally received.
>
> Conceiving, however, at a later period that you might possibly wish to declare the law of nations thereon, jointly with the Court of Russia, in some ostensible shape, I broached the matter anew to Count Nesselrode, and suggested that he should authorize Count Lieven, on your invitation, to exchange notes with you declaratory of the law as fixing the distance at 1 marine league from the shore.
>
> Count Nesselrode replied that he should feel embarrassed in submitting this suggestion to the Emperor just at the moment when the ratifications of the Convention were on the point of being dispatched to London; and he seemed exceedingly desirous that nothing should happen to retard the accomplishment of that essen-

tial formality. He assured me at the same time that his Government would be content, in executing the Convention, to abide by the recognized law of nations; and that, if any question should hereafter be raised upon the subject, he should not refuse to join in making the suggested declaration, on being satisfied that the general rule under the law of nations was such as we supposed.

Having no authority to press the point in question, I took the assurance thus given by Count Nesselrode as sufficient, in all probability, to answer every national purpose.

In the Fur Seal Arbitration of 1893 between the United States and Great Britain, the five questions submitted to the arbitrators included the following (1 *Fur Seal Arbitration;* Award and Declarations 76):

1. What exclusive jurisdiction in the sea now known as the Bering's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

* * * * *

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?

The award of the arbitrators on these questions was as follows (*ibid.*, 77–78; emphasis added):

> As to the first of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine as follows:
>
> By the Ukase of 1821 Russia claimed jurisdiction in the sea now known as the Bering's Sea to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the *reach of cannon shot from shore,* and it appears that from that time up to the time of the cession of Alaska to the United States Russia never asserted in fact or exercised any exclusive jurisdiction in Bering's Sea or any exclusive rights in the seal fisheries therein beyond the *ordinary limit of territorial waters.*
>
> * * * * *
>
> As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Bering Sea, east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, did pass unimpaired to the United States under the said Treaty.
>
> As to the fifth of the said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr.

> Gregers Gram, being a majority of the said Arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the *ordinary three-mile limit.*

B. *Letter from Secretary of State Livingston to Mr. Baylies, January 26, 1832.*[1]

On January 26, 1832, Secretary of State Livingston wrote a letter of instructions to Mr. Baylies, chargé d'affaires to the Republic of Buenos Ayres. With reference to disputed fishing rights around the Falkland Islands, he said (1 Moore, *Digest of International Law* (1906) 876 at 881–883):

> The ocean fishery is a natural right which all nations may enjoy in common. Every interference with it by a foreign power is a national wrong. When it is carried on within the marine league of the coast, which has been designated as the extent of national jurisdiction, reason seems to dictate a restriction. If, under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it, but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary one. No such evil can be apprehended on a desert and uninhabited coast; therefore such coasts form no exception to the common right of fishery in the seas adjoining them.

[1] On December 12, 1958, we informed the defendant States of our intention to refer to this letter.

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All the reasoning on the subject of the ocean applies to the large bays the entrances to which cannot be defended.

* * * * *

From the foregoing facts, and principles applicable to them, you are instructed to press, in the negotiation you are authorized to open on the occasion:

1. The perfect right of the United States to the free use of the fishery—on the ocean, in every part of it, and on the bays, arms of the sea, gulfs, and other inlets, which are incapable of being fortified.

2. To the same perfect right on the ocean within a marine league of the shore, when the approach cannot be injurious to the sovereign of the country, as it can not be on the shores which are possessed by savage tribes, or are totally deserted, as they are to the south of the Rio Negro.

II

COMMENTS IN RESPONSE TO LOUISIANA'S REPLY BRIEF AND TEXAS' MEMORANDUM OF ADDITIONAL RESEARCH

A. *Opinions of the Attorney General of Louisiana.*

In our Reply Brief, page 52, we mentioned two opinions of the Attorney General of Louisiana, which had been discussed at greater length in our Brief in Support of Motion for Judgment filed March 1, 1957, pages 152–153, fn. 38. Letter to Mr. L. J. Neuman, September 21, 1934; letter to William G. Rankin, State Commissioner of Conservation, December 8, 1937. Since Louisiana in its Reply Brief, pages 23–26, has questioned the significance of those

letters, we may repeat the substance of what we said earlier regarding them. The first letter was in reply to a request for some reference to the southern legal boundary of the State. It merely quoted from the Act of Congress admitting Louisiana to the Union, and said, "you will note that the southern boundary of the State of Louisiana is given as the Gulf of Mexico." *Reports and Opinions of the Attorney General of Louisiana from April 1, 1934, to April 1, 1936,* page 685. The second letter was in response to an inquiry by the Conservation Commissioner as to whether certain oyster reefs near Marsh Island were within the jurisdiction of Louisiana. It reviewed certain international law authorities and federal decisions declaring a three-mile limit to have been adopted by the United States, and said, "we conclude, in consonance with the treaties of the United States with foreign powers, and the jurisprudence of the United States Supreme Court, that the minimum limit of the territorial water domain of our state in the Gulf of Mexico extends at the present time to a distance of three marine miles (60 to a degree of latitude) from the lowest point of low water mark of the coast." *Reports and Opinions of the Attorney General of Louisiana from April 1, 1936, to April 1, 1938,* page 959. In our view, such answers indicate that at that time the Attorney General of Louisiana was not asserting a three-league boundary for the State. We do not claim for the letters any greater significance than that.

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B. Tabulation of the Louisiana offshore area.

When Senator Holland was explaining the Submerged Lands Act to the Senate, he displayed a tabulation of the offshore areas of the various States, in which it was stated that the areas were computed on the basis of a three-mile limit for all States except Texas, Louisiana and Florida, for which a three-league limit had been used. However, Senator Holland told the Senate that the statement was erroneous so far as Louisiana was concerned, as the figures given for it were actually on the basis of a three-mile limit. 99 Cong. Rec. 2755. In referring to this in our reply brief, at page 51, we expressed the opinion that Senator Holland's statement was correct, since the figures in the table agreed with those on a map used by him which showed a three-mile limit for Louisiana. In its Reply Brief, Louisiana gives figures indicating that the area given in the table was in fact based on a three-league limit for Louisiana, and on examination of these figures we agree that Senator Holland was in error when he told the Senate that the table was based on a three-mile limit for that State.

However, while it would of course have been an added support for our position if Senator Holland's statement to the Senate had been correct, the important facts continue to be that Senator Holland did so inform the Senate and that Congress did not intend by the Submerged Lands Act to confirm any particular claim of any State (U.S. Brief, 51–58, 389–402).

Thus, with respect to certain other tables[2] Senator Cordon said (99 Cong. Rec. 2694; U.S. Br. 391–392):

> The Senator from Oregon has indicated heretofore, and reiterates—although it is unnecessary—that this joint resolution does not locate the State boundaries. On page 570 of the hearings there appear certain tables which were presented by the United States Geological Survey and which indicate that someone in the Federal Government has some idea of where traditional State boundaries are. The Senator from Oregon does not confirm the accuracy of the tables. He simply states they are printed at that point in the hearings.

C. Protests to Spain during President Jefferson's Administration.

At page 64 of our main brief we quoted from a letter written by Secretary of State Bayard in 1886 in which he described an American protest to Spain, during the early years of President Jefferson's administration, against a claim of a six-mile marginal belt around Cuba. Letter from Secretary of State Bayard to Secretary of the Treasury Manning, May 28, 1886, 1 Moore, *Digest of International Law* (1906) 718, 720. In its Memorandum of Additional Research, Texas reports its inability to find documentary evidence to corroborate that account, and suggests that Secretary Bayard was mistaken. We have likewise been unable

[2] The tables referred to were computed on the basis of a three-mile limit for Louisiana and California and a three-league limit for Texas. Senate Interior Committee Hearings on S.J. Res. 13, 83d Cong., 1st Sess., p. 567.

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to find corroborative material in records in the State Department or the National Archives, or in published historical works. While this naturally raises some doubt as to the correctness of Secretary Bayard's account, we cannot dismiss the possibility that the protest was an oral one, or that it was made in a document which has since been destroyed, as we are informed by the State Department has been the case with much of our Spanish correspondence of that period. Perhaps the most significant aspect of Secretary Bayard's letter is that it shows that as early as 1886 the State Department regarded the American position on the three-mile limit as one maintained from the earliest times and not as a recent innovation.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1959.